

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1456

To be argued by
CONSTANCE CUSHMAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1456

UNITED STATES OF AMERICA,

Appellee,

—V.—

JOSE MIGUEL ATILES,

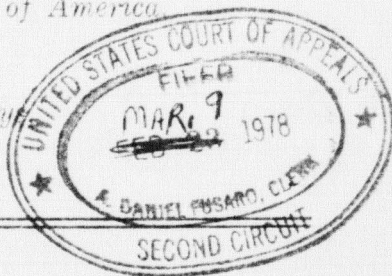
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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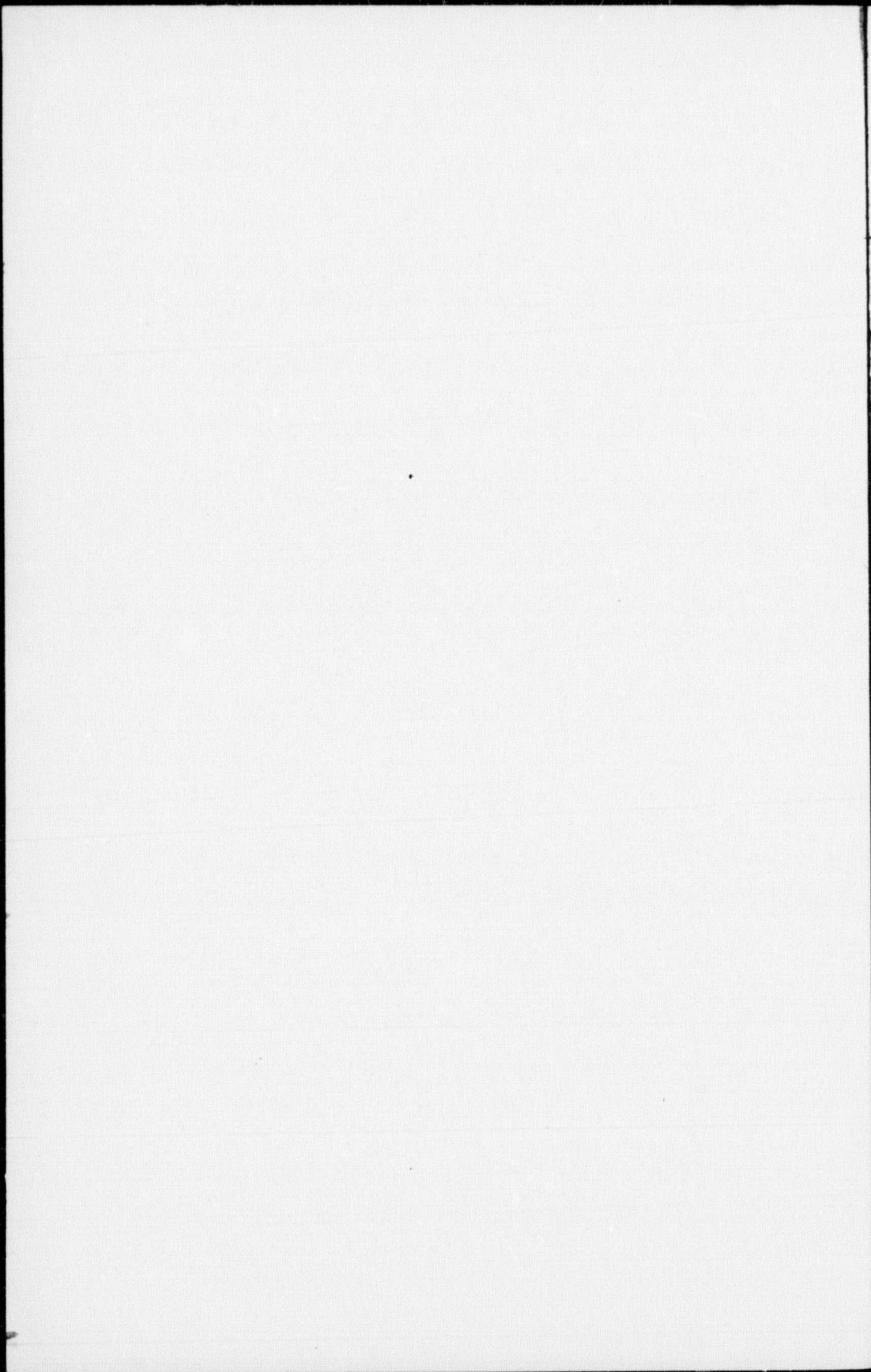


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
The Government's Case	2
The Defense Case	6
ARGUMENT:	
POINT I—There Was Sufficient Evidence To Support a Finding That Atilas Was a Member of The Conspiracy	6
POINT II—The Government Did Not Violate Its <i>Brady</i> Obligations	10
POINT III—The Court's <i>Allen</i> Charge Was Entirely Proper	14
POINT IV—The Court Did Not Abuse Its Discretion By Receiving In Evidence The Physical Evidence Of Heroin Seized On April 12, 1977	16
CONCLUSION	19

TABLE OF CASES

<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	10, 12, 14
<i>Giglio v. United States</i> , 405 U.S. 150 (1972)	13
<i>Moore v. Illinois</i> , 408 U.S. 786 (1972)	13
<i>United States ex rel. Meers v. Wilkins</i> , 326 F.2d 135 (2d Cir. 1964)	13
<i>United States v. Agueci</i> , 310 F.2d 817 (2d Cir. 1962), <i>cert. denied</i> , 372 U.S. 959 (1963)	7, 10

<i>United States v. Aviles</i> , 274 F.2d 179 (2d Cir.), <i>cert. denied</i> , 362 U.S. 974 (1960)	7
<i>United States v. Bentvena</i> , 319 F.2d 916 (2d Cir.), <i>cert. denied</i> , 375 U.S. 940 (1963)	7, 8
<i>United States v. Bermudez</i> , 526 F.2d 89 (2d Cir. 1975), <i>cert. denied</i> , 425 U.S. 970 (1976)	15
<i>United States v. Brawer</i> , 367 F. Supp. 156 (S.D.N.Y. 1973) affirmed 496 F.2d 703 (2d Cir.), <i>cert. denied</i> , 419 U.S. 1051 (1974)	13, 14
<i>United States v. Corey</i> , 566 F.2d 429 (2d Cir. 1977)	13
<i>United States v. DeNoia</i> , 451 F.2d 979 (2d Cir. 1971)	7, 8
<i>United States v. Erb</i> , 543 F.2d 438 (2d Cir.), <i>cert. denied</i> , 429 U.S. 981 (1976)	13
<i>United States v. Gaines</i> , 460 F.2d 176 (2d Cir.), <i>cert. denied</i> , 409 U.S. 883 (1972)	10
<i>United States v. Green</i> , 528 F.2d 229 (2d Cir. 1975)	16
<i>United States v. Hynes</i> , 424 F.2d 754 (2d Cir.), <i>cert. denied</i> , 399 U.S. 933 (1970)	15
<i>United States v. Keogh</i> , 391 F.2d 138 (2d Cir. 1968)	13
<i>United States v. LaVecchia</i> , 513 F.2d 1210 (2d Cir. 1975)	7, 8
<i>United States v. Leonard</i> , 524 F.2d 1076 (2d Cir. 1975), <i>cert. denied</i> , 425 U.S. 958 (1976)	17, 19
<i>United States v. Magnano</i> , 543 F.2d 431 (2d Cir. 1976), <i>cert. denied</i> , 429 U.S. 1091 (1977) ...	6, 7, 8
<i>United States v. Martinez</i> , 446 F.2d 118 (2d Cir.), <i>cert. denied</i> , 404 U.S. 944 (1971)	16
<i>United States v. Meyers</i> , 410 F.2d 693 (2d Cir.), <i>cert. denied</i> , 396 U.S. 835 (1969)	16
<i>United States v. Rao</i> , 394 F.2d 354 (2d Cir. 1968) .	15

	PAGE
<i>United States v. Ravich</i> , 421 F.2d 1196 (2d Cir.), cert. denied, 400 U.S. 834 (1970)	19
<i>United States v. Reina</i> , 242 F.2d 302 (2d Cir.), cert. denied, 354 U.S. 913 (1957)	7
<i>United States v. Robinson</i> , 560 F.2d 507 (2d Cir. 1977) (en banc)	13, 16, 17, 18, 19
<i>United States v. Ruggiero</i> , 472 F.2d 599 (2d Cir.), cert. denied, 412 U.S. 939 (1973)	12, 14
<i>United States v. Sperling</i> , 506 F.2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975)	7
<i>United States v. Stewart</i> , 513 F.2d 957 (2d Cir. 1975)	13
<i>United States v. Stromberg</i> , 268 F.2d 256 (2d Cir.), cert. denied, 361 U.S. 863 (1959)	7
<i>United States v. Torres</i> , 503 F.2d 1120 (2d Cir. 1974)	7, 8, 9
<i>United States v. Tramunti</i> , 513 F.2d 1087 (2d Cir. 1975)	9
<i>United States v. Tramunti</i> , 500 F.2d 1334 (2d Cir.), cert. denied, 419 U.S. 1079 (1974)	13, 14
<i>Williams v. United States</i> , 503 F.2d 995 (2d Cir. 1974) (per curiam)	13

OTHER AUTHORITIES

Federal Rules of Evidence,	
Rule 403	17, 19

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1456

UNITED STATES OF AMERICA,

Appellee,

--v.--

JOSE MIGUEL ATILES,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Jose Miguel Atilas appeals from a judgment of conviction entered on November 9, 1977, in the United States District Court for the Southern District of New York, after a four day trial before the Honorable William C. Conner, United States District Judge, and a jury.

Indictment 77 Cr. 330, filed on May 2, 1977, charged Atilas and Manuel Perez in five counts with violations of the federal narcotics laws.* Atilas was named in two of

* Manuel Perez pleaded guilty to Counts Two and Five on September 12, 1977. The remaining counts were dismissed as to him upon the Government's consent at the time of his sentence, October 12, 1977. Perez was sentenced under Title 18, United States Code, Section 5010(b), to a term of imprisonment of up to six years.

the five counts. Count One charged both defendants with conspiracy to violate the federal narcotics laws from January 1, 1977 until May 2, 1977, together with others known and unknown to the Grand Jury. Count Five charged each of the defendants with the distribution of five ounces of heroin on April 12, 1977, in violation of Title 21, United States Code, Section 841(a)(1).*

The trial of Atilas commenced September 29, 1977. On October 6, 1977, the jury convicted him on both counts. On November 9, 1977, Judge Conner sentenced Atilas on both counts concurrently to a term of eighteen months, of which six months was to be served in a jail-type institution, to be followed by the statutorily required three years' special parole.

Statement of Facts

A. The Government's Case

Two officers of the New York Joint Drug Enforcement Task Force, ("NYDETF"), Detective Ralph Nieves and Police Officer Julio Mercado, testified that they conducted undercover negotiations with Perez and Atilas in Perez' apartment on April 12, 1977, which culminated in the arrest of the two defendants and the seizure of the five ounces of heroin. Both Mercado and Nieves testified that they met Perez near his home at 410 East 10th Street on April 11, 1977, and approached him to see if they could purchase ten ounces of heroin from him at that time. Perez told them he would have to go to Brooklyn to get it, and the officers drove him in their undercover car to a location in Brooklyn near the Two Step Bar,

*Counts Two, Three and Four charged Manuel Perez with the distribution of various quantities of heroin between January 1977 and April 12, 1977.

where Perez said he would speak to his source. En route, they fixed the price of the heroin at \$1000 per ounce. They left Perez in Brooklyn and returned to the vicinity of his apartment to await him. When he returned some time later he told them that he could not get the heroin that day but would have it for them the following day, April 12, 1977, if they would come to his house around 9:00 p.m. After numerous assurances that he would have the "material," the officers left. (Tr. 155-58, 262-65).*

At 9:00 p.m. the following day, the two officers returned to Perez' apartment. (Tr. 78-83, 266). When they entered the living-dining room area of his two bedroom apartment, they saw Jose Miguel Atilas, whom they had never seen before. Perez performed introductions. According to Nieves, Perez said to the officers, "This is my partner, Mikey El Flaco," and to Atilas, "This is Ralphie, one of my better customers." (Tr. 83-85). As Mercado recalled, Perez stated to the officers, "This is my partner," and to Atilas, "These are the guys I was telling you about." (Tr. 268-70).

Both officers testified that Perez and Nieves then began talking about the heroin the officers were to purchase. Nieves asked if Perez had it, and Perez said they were only able to get five ounces. (Tr. 84-85, 270). Perez said to Atilas that when they had sold those five ounces, they would go to Brooklyn and get more, and Atilas responded with a nod, as Nieves recalled, or with a verbal "Okay," as Mercado recalled. (Tr. 91-92, 270-71). Perez entered the kitchen area, adjacent to a table where Atilas was sitting,** and returned immediately with a clear plastic

* References to Government Exhibits, to pages of the transcript, and to Appellant's Brief are abbreviated herein, respectively, as "GX," "Tr.," and "Br."

** GX 13, a diagram of Perez' apartment, demonstrated where Atilas was seated.

bag containing five smaller clear plastic bags of heroin * (GX 1). Perez placed the heroin on the table in front of Atilas. (Tr. 85, 271). Perez said the price would be \$1500 per ounce, and when Nieves protested that they had agreed upon a price of \$1000 per ounce, Perez responded that that was for ten, not five ounces. (Tr. 92, 271). Both officers testified that at this point Atilas stated that the heroin was of excellent quality. (Tr. 91, 271). The officers agreed to purchase the heroin, and Mercado left the apartment, ostensibly to get the money. Several minutes later he returned with other officers, and both defendants were placed under arrest. A search warrant was then served upon Perez, and the search of his apartment yielded two additional quantities of heroin which were also received in evidence. (GX 2, 3). These were eighth-ounce and "quarter spoon" packages, also in clear plastic bags, rolled tightly and about the size of small cigarettes.** (Tr. 238, 245, 257). On a bookshelf next to where Atilas had been sitting were found various heroin cutting and packaging paraphernalia. (GX 4, 5, 6, 7, 8, 9).

Nieves also testified about negotiations with Perez and purchases from Perez on many prior occasions. He testified that he was introduced to Perez by one Jose Aponte who took him to Perez' apartment on January 28, 1977. On that occasion he purchased one ounce of heroin from Perez for \$1400 and agreed to make further purchases in the future. (Tr. 114-19). On February 11, 1977, accompanied by another undercover officer he again met Perez

* The defendant stipulated that this was heroin. (Tr. 88).

** These were similar in size and appearance to packets of heroin Perez had showed Nieves on April 8, 1977, during the course of continued negotiations for heroin. Perez at that time stated that the small packets were what he was selling on the street but were of the same quality as the larger quantity he would sell Nieves. (Tr. 245).

and sought to purchase an eighth-kilo of heroin. Perez later took Nieves alone to a bar nearby, to a back room occupied by approximately five or six people, where Nieves was searched and one man said "That's not him." (Tr. 120-24). Nieves testified that Perez explained to him that he had been searched because Nieves' partner resembled another undercover officer who had recently infiltrated the area, and that he, Perez, "had a number of associates that had a problem in Chicago and that they had been arrested as a result of undercover infiltration that his organization of sixteen associates had a problem and only he and his partner were left." (Tr. 151). The two then proceeded to agree on a quantity and price for heroin Nieves was to purchase.

On February 14, 1977, Nieves purchased one ounce of heroin from Perez in Perez' apartment for \$1600. (Tr. 126-38). On February 23, 1977, Nieves purchased four ounces of heroin from Perez, again in his apartment, for \$6000. At that time Perez told him he was going to his source, Casilas, in Brooklyn, to obtain more heroin, (Tr. 129-32). On March 22, 1977, Nieves negotiated with Perez and one Antonio Andino Rivera for the purchase of fifteen ounces of heroin at \$1000 per ounce. On that occasion Perez showed Nieves a quantity of heroin concealed in his kitchen stove which he stated was already promised to another customer. (Tr. 133-37). Also on that occasion Perez introduced Rivera to Nieves as "a partner" (Tr. 135), and Rivera commented that the heroin was excellent. (Tr. 135).

On April 8, 1977, Nieves once again returned to Perez' apartment in an effort to purchase heroin. Perez said he did not have it at that time, that he was expecting some from his source in Brooklyn and would call Nieves when he obtained it. At that time he showed Nieves eight "quarter spoons" of heroin, each about the size of a cigarette, which he said were what he sold on the street but which were samples of the same quality he would sell Nieves. (Tr. 151-53).

B. The Defense Case

The defendant presented no evidence.

POINT I

There Was Sufficient Evidence To Support A Finding That Atilas Was A Member Of The Conspiracy.

In Count One of the indictment, Atilas was charged with participating in a conspiracy, with Manuel Perez and other unknown co-conspirators, to violate the federal narcotics laws. In proving the existence of that conspiracy, the Government offered evidence that Perez, and others, sold heroin to the undercover agents on four occasions during January, February and March, 1977. Atilas argues to this Court, as he did in the District Court, that since the evidence only showed his participation in the final sale on April 12, 1977, under the single transaction rule, his conviction on the conspiracy count must be reversed. This argument overstates the single transaction rule and overlooks the evidence which demonstrates that Atilas joined the conspiracy with knowledge of its scope.

As this Court stated in *United States v. Magnano*, 543 F.2d 431, 434-35 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977), the single transaction rule

“recognizes that a single isolated act does not, *per se*, support an inference that a defendant had knowledge of, or acquiesced in, a larger conspiratorial scheme. It is only ‘when there is no independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy and when the single transaction is not in itself one from which knowledge might be inferred,’ . . . that the single act is an insufficient predicate upon which to link the actor to the overall conspir-

acy." (quoting *United States v. Agueci*, 310 F.2d 817, 836 (2d Cir. 1962), *cert. denied*, 372 U.S. 9 (1963)).

Accord *United States v. LaVecchia*, 513 F.2d 1210, 1219 (2d Cir. 1975); *United States v. Torres*, 503 F.2d 1120, 1123 (2d Cir. 1974); *United States v. Sperling*, 506 F.2d 1323, 1342 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *United States v. DeNoia*, 451 F.2d 979, 981 (2d Cir. 1971); *United States v. Bentvena*, 319 F.2d 916 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *United States v. Aviles*, 274 F.2d 179, 189-90 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960); *United States v. Stromberg*, 268 F.2d 256 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959). In the context of narcotics conspiracy cases, this Court has overturned conspiracy convictions where there was no more than one sale or purchase of narcotics, finding such evidence to be an insufficient basis for an inference that the defendant had knowledge of a much larger conspiracy charged and proved by the Government. *United States v. De Noia*, *supra* (single delivery of heroin by De Noia insufficient basis to infer knowledge of broader conspiracy; *United States v. Sperling*, *supra* (mere delivery of cocaine insufficient to link Del Busto and Garcia to larger conspiracy); *United States v. Aviles*, *supra* (single purchase of narcotics by Rodriguez insufficient to infer that he knew of broader conspiracy to which the seller belonged); *United States v. Stromberg*, *supra* (delivery by Snyder of two suitcases insufficient to connect him with larger conspiracy); *United States v. Reina*, 242 F.2d 302 (2d Cir.), *cert. denied*, 359 U.S. 913 (1957), (single sale by Valachi insufficient to justify inference that he knew the sale to be part of larger venture). However, where there has been evidence beyond the single purchase or sale which demonstrated the defendant's knowledge that he has joined a larger conspiracy, this Court has consistently upheld convictions for conspiracy, even though the defendant's active participation did not exceed the single transaction. *United States v. LaVecchia*, *supra*

(Andreotis' negotiations with two co-conspirators, knowledge of code vocabulary suggesting "familiarity with trade often conducted on a large scale with large numbers of people," and size of sale showed knowledge of scope of conspiracy); *United States v. Torres, supra* (Torres' participation in one transaction, but presence at another, sufficient to support conspiracy conviction); *United States v. De Noia, supra* (Jacovino and Scorzello properly convicted of conspiracy where their participation in single transactions showed knowledge of wider conspiracy); *United States v. Bentvena, supra* (Fernandez' conspiracy conviction upheld on basis of participation in one delivery and attendance at meeting where broader scope of conspiracy discussed). See also *United States v. Magnano, supra* (size of single narcotics sale sufficient to justify inference that defendants knowingly involved in criminal enterprise of substantial scope).

In this case, there was more than sufficient evidence that Atiles had knowledge of the broadened conspiracy charged in the indictment and proved at trial. Specifically, when Atiles was introduced to the undercover agents at the time of the April 12 transaction, Perez introduced the agents as "one of my better customers" and as "the guys I was telling you about." These statements by Perez constituted direct and explicit evidence that Atiles knew that Perez had sold heroin to the undercover agents in the past. Indeed, they easily justified an inference that Atiles knew Perez' heroin business to include many customers, with the agents being among the "better" customers.

Later in the conversation, after the negotiations had proceeded, Perez said to Atiles that after the sale they would go back to Brooklyn and "re-up," to which Atiles assented. From this evidence the jury could properly infer that Atiles knew that in Perez' prior sales to these customers, other co-conspirators were necessarily involved in supplying the heroin. Moreover, the jury could infer

that Atilas knew Perez' source of supply in Brooklyn, since Perez discussed going "back" and the need to "re-up" in language that suggested regular and long-standing contact between the supplier, Atilas and himself. Perez' reference to Atilas as his "partner" supported this inference.*

Of course, this was not a case, like most of the cases discussing the single transaction rule, where a large, far-flung conspiracy was involved. The conspiracy charged and proved involved only four purchases of heroin from Perez during the three months before the April 12th transaction. In the context of a relatively small conspiracy, "to speak of a 'single act,' is misleading" since the single act constitutes a proportionately large part of the overall conspiracy. *United States v. Torres*, *supra* at 1124. *Accord*, *United States v. Tramunti*, 513 F.2d 1087, 1112 (2d Cir. 1975). Here, where Atilas participated in the April 12th sale with knowledge of prior sales to the agents and with familiarity with the source of supply, he joined the conspiracy with knowledge of its full scope. Accordingly, the cases explaining and

* Atilas, seeking to place the most restrictive and literal possible meaning on the language of the transactions, argues that if Rivera was Perez' "partner" on March 22, 1977, Atilas cannot have been Perez' "partner" on April 12, 1977, because on February 11, 1977 Perez said that only himself and his partner remained in his organization. Such a literal interpretation and reliance on one word disregards both the realities of heroin trafficking and the rest of the testimony at trial. The jury could well have found that "partnership" arrangements among heroin traffickers, especially those with numerous affiliates, as Perez clearly had, are not necessarily immutable nor even very stable. Traffickers may be temporarily out of action for any number of reasons, may be abandoned altogether, or may join a continuing organization at any point. Perez' was clearly an organization with a large and fluid membership, and the jury would have been justified in concluding from all the evidence that Atilas was one of a members of associates of Perez whom he termed "partners."

applying the single transaction rule completely support affirmance of Atilés' conviction on the conspiracy count.

In any event, since Judge Conner imposed concurrent sentences on the conspiracy and substantive counts, this Court need not review the application of the single transaction rule to the conspiracy count. *United States v. Agueci, supra*; See also *United States v. Gaines*, 460 F.2d 176 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972).

POINT II

The Government Did Not Violate Its Brady Obligations.

As his second point, Atilés has constructed an argument which asserts that the Government violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, he claims that the Government knew that Atilés' co-defendant, Perez, would testify that Atilés was merely present during the April 12th sale and that the Government failed to reveal that fact to the defense. A review of the pertinent record reveals that this claim is factually incorrect and that no *Brady* violation occurred.

The background for this claim is the commonplace fact that Atilés' co-defendant, Perez, pled guilty prior to trial and was expected to cooperate with the Government by testifying at Atilés' trial. As becomes apparent from the minutes of Perez' guilty plea, before the plea Perez met with the prosecutor in this case and described both his and Atilés' roles in the April 12th narcotics transaction. (Tr. of 9/12/17 at 17). However, when the plea was taken, Perez, who was placed under oath, balked at describing Atilés' involvement, stating that Atilés did not accompany him to pick up the heroin. (Tr. 17). The Assistant United States Attorney thereupon questioned Perez on the basis of his prior inconsistent statements to

her before the plea. Perez then conceded that Atilas went with him to get the heroin. (Tr. 18).

Perez' plea took place immediately before a pre-trial conference held with Atilas and his attorney. (App. 8). Accordingly, both Atilas and his lawyer were able to observe that Perez was reluctant to implicate Atilas and indeed, that he was willing to minimize Atilas' involvement even though he, Perez, was under oath and in the presence of a prosecutor to whom he had told a different story on that very same day.*

Perez was not called by the Government as a witness at trial. Having observed the plea, defense counsel necessarily would have concluded that Perez was either a reluctant or unhelpful witness for the Government's cause. The defense also did not call Perez.

At sentencing, Atilas attempted to parley these facts into a *Brady* claim. Atilas' counsel argued to the District Court, as he does to this Court, that having read the presentence report he first discovered that Perez was a potentially helpful witness for the defense and that the Government concealed this information from him. Specifically, he argued that the report revealed that Perez told the Assistant United States Attorney that Atilas was

* Defense counsel would be hard pressed to claim now that he did not appreciate the fact that Perez was an unwilling witness for the Government. Having heard Perez' plea and noted his reluctance to implicate Atilas, defense counsel stated as follows:

"And I think after having heard the somewhat equivocal statement by Mr. Perez as to the extent of Mr. Atilas' involvement, that he had to be corrected on the record under oath a few minutes ago as to exactly what was going on, I think Mr. Atilas is encouraged to going to trial actually . . . Mr. Atilas is not too impressed by Mr. Perez as a witness [for the Government]." (Tr. of Sept. 12, 1977, pp. 7, 8).

merely present at the sale on April 12, 1977. In the District Court, Judge Conner responded to this charge, which was based on defense counsel's rendition of the presentence report, as follows:

"You have not only misquoted it, but you have gotten the import of the statement completely wrong.

"What the portion of the presentence report that is entitled Details of the Offense states in this: Perez had indicated that he is reluctant to testify in the Atilas trial with the exception of admitting that his co-defendant was present at the time of the arrest.

. . . He was, in effect, refusing to testify . . . That motion is denied. (Sentence Tr. 4-5).*

Atilas now tries to persuade this Court that, while he knew of Perez' existence as a potential witness, knew of his whereabouts,** and was aware of the events that transpired at Perez' guilty plea, Atilas was entitled to be told by the Government that Perez was reluctant to testify at trial. *Brady, supra*, and its progeny do not reach this far. As the cases clearly hold,

According to the language of *Brady*, in order to come within its ambit, the subject matter of the defendant's complaint of suppression must be *evidence* (*United States v. Ruggiero*, 472 F.2d 599,

* At the time of Atilas' sentence, November 9, 1977, the District Judge had seen and evaluated the Government's Sentencing Memorandum submitted in connection with Perez' sentence on September 13, 1977. That Affidavit was placed under seal by the District Court and has been transmitted to this Court under seal as part of the record on appeal in this case.

** Perez was in custody in lieu of bail at the time of his guilty plea, and at the conclusion of that plea the District Judge denied his motion to reduce bail.

604 (2d Cir.), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2772, 37 L.Ed. 2d 398 (1973)) *favorable* to defendant for which he made a *timely demand*; (*United States v. Keogh*, 391 F.2d 138, 147 (2d Cir. 1968)); moreover, such evidence must be *material*, either to guilt (*Moore v. Illinois*, 408 U.S. 786, 794-95, 92 S.Ct. 2562, 33 L.Ed. 2d 706 (1972); *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed. 2d 104 (1972); *United States v. Keogh*, 391 F.2d 138, 147 (2d Cir. 1968)), or punishment. The absence of any of these factors, unless supplied by implication, see *United States ex rel. Meers v. Wilkins*, 326 F.2d 135 (2d Cir. 1964), seemingly preclude a claim of deprivation of due process under *Brady*.

United States v. Brawer, 367 F. Supp. 156 (S.D.N.Y. 1973), *affirmed*, 496 F.2d 703 (2d Cir.), *cert. denied*, 419 U.S. 1051 (1974).

Here, of course, the "information" allegedly withheld was not only not *evidence*, it was not even exculpatory. As set forth in the presentence report, and reiterated by the District Judge, Perez did no more than express reluctance to give inculpatory testimony against his co-defendant. Defense counsel had to surmise that this had happened from the Government's failure to call Perez as a witness. Where the defendant is on notice of the essential facts which would enable him to produce the alleged exculpatory evidence, the Government is not required to go farther. *United States v. Erb*, 543 F.2d 438, 443 (2d Cir.), *cert. denied*, 429 U.S. 981 (1976). See also, *United States v. Corey*, 566 F.2d 429 (2d Cir. 1977); *United States v. Robinson*, 560 F.2d 507, 518 (2d Cir. 1977) (en banc); *United States v. Stewart*, 513 F.2d 957, 960 (2d Cir. 1975); *Williams v. United States*, 503 F.2d 995, 998 (2d Cir. 1974) (per curiam); *United States v. Tramunti*, 500 F.2d 1334, 1349-

50 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974); *United States v. Brawer, supra*; *United States v. Ruggiero, supra*. Furthermore, as *United States v. Ruggiero, supra* and *United States v. Brawer, supra*, make clear, defense counsel who have every opportunity, and indeed the obligation, to interview prospective witnesses, cannot complain that the Government did not produce for them the full product of the Government's own investigation, whether that be the detailed contents of investigative reports or the contents of Grand Jury testimony.

In sum, there was no violation of *Brady* since Atilas was on notice that Perez was available as a witness and, indeed, that Perez was willing to help Atilas where possible. When the Government rested without calling Perez, Atilas had to know as much as he needed to know about Perez' potential value as a witness for the defense. Of course, it is not surprising that Atilas' counsel nevertheless did not call Perez; an exculpation of Atilas by Perez would have been met by cross-examination based on Perez' sworn allocution implicating Atilas. Thus, Atilas' decision to rest without calling Perez must realistically be attributed to a reasonable tactical decision and not to any purported *Brady* violation by the Government.

POINT III

The Court's *Allen* charge Was Entirely Proper.

Quoting out of context one sentence in each of the two *Allen* charges given by the District Court, Atilas attempts to persuade this Court that the charges prejudiced him because they unduly emphasized the cost to the Government should the jury not reach a verdict. His argument wholly misrepresents the balanced nature of the two *Allen* charges, in each of which the Court stressed quite clearly that no juror should relinquish a conscientiously held view.

The jury stated it was deadlocked at the end of its first full day of deliberations, October 5, 1977. Early in the day it had requested a reading of the critical testimony about the introductions and conversations among Mercado, Nieves, Perez and Atilas on April 12, 1977. Because the transcript had not been typed and counsel disagreed on what portions were within the scope of the jury's request, that testimony was not read to the jury until well after the luncheon recess. About two and one-half hours later the first deadlock note was sent; the Court delivered the *Allen* charge, and allowed the jury to retire until the morning. Deliberations did not resume until 11:30 a.m., October 6, 1977 and at 2:30 p.m. the jury declared itself still deadlocked. The Court repeated the *Allen* charge, and the jury returned its verdict a little more than one hour later.

Atilas does not now contest the timing of the two *Allen* charges, but restricts his claim on appeal to the contention that their content was unbalanced and unduly coercive.

In *United States v. Hynes*, 424 F.2d 754, 757 (2d Cir.), *cert. denied*, 399 U.S. 933 (1970) this Court held that the

"function of the *Allen* charge was to emphasize that a verdict is in the best interest of both prosecution and defense, and we adhere to the view that '[t]he considerable costs in money certainly justify an instruction to the jury that if it is possible for them to reach a unanimous verdict without any juror yielding a conscientious conviction . . . they should do so. *United States v. Rao*, 394 F.2d 354, 355 (2d Cir. 1968)'"

See also, *United States v. Bermudez*, 526 F.2d 89, 100 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976). This court has repeatedly held that

"The propriety of an Allen-type charge depends on whether it tends to coerce undecided jurors into reaching a verdict by abandoning without reason conscientiously held doubts. See *United States v. Green*, 528 F.2d 229, 236 (2d Cir. 1975)."

United States v. Robinson, *supra*, at 517. See also, *United States v. Martinez*, 466 F.2d 118, 119-120, (2d Cir.), *cert. denied*, 404 U.S. 944 (1971); *United States v. Meyers*, 410 F.2d 693, 697 (2d Cir.), *cert. denied*, 396 U.S. 835 (1969).

The language of which Atilas complains was followed immediately by strong language very sympathetic to the defendant, emphasizing the pain and mental anguish he endures during trial and while awaiting a new trial. Nothing in the charge suggested that the jury resolve its differences in one direction or the other; the Court simply brought to the jury's attention the fact that no one's interests were served by this jury's failing to agree upon a verdict.

Viewed in its entirety, the Allen charge twice given by the District Judge was fair, impartial, and in no way coercive.

POINT IV

The Court Did Not Abuse Its Discretion By Receiving In Evidence The Physical Evidence Of Heroin Seized On April 12, 1977.

Atilas argues, as he argued to the District Court, that once he stipulated that the product seized on April 12, 1977 after negotiations among Atilas, Perez, Nieves and Mercado was heroin, and that Atilas was unquestionably present during its proposed sale, the heroin itself became inflammatory and consequently inadmissible under Rule

403, F. R. Ev. The District Judge properly rejected that argument, as should this Court.

The direct relevance of the evidence is undisputed, for unquestionably an element to be proven in the Government's *prima facie* case was that the substance possessed was in fact heroin. This was the crux of the case and was in no way a collateral matter. Atilis conceded the relevance of the evidence by his offer to stipulate as described above.

The only question, therefore, was the *manner* in which this highly relevant evidence was to be placed before the jury. Atilis sought to eviscerate the necessary proof by reducing it to a stipulation; the Government sought to place the material which was the substance of the alleged crime before the jury for its consideration.

Rule 403, F. R. Ev., provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." The Advisory Committee Notes define "unfair prejudice" as "any due tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." As this Court recently observed,

Absent counterbalancing probative value, evidence having a strong emotional or inflammatory impact, such as a "bloody shirt" or "dying accusation of poisoning," see *United States v. Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975), *cert. denied*, 425 U.S. 958, 96 S.Ct. 1737, 48 L.Ed.2d 202 (1976), may pose a risk of unfair prejudice because it "tends to distract" the jury from the issues in the case and "permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened." Advisory Com-

mittee Notes, FRE 404, quoting with approval the California Revision Commission. The effect in such a case might be to arouse the jury's passions to a point where they would act irrationally in reaching a verdict.

United States v. Robinson, supra, at 514.

Here, of course, the heroin in evidence was the very essence of the crime charged. Any "prejudice" to the defendant resulted not from the Government's offer to introduce it against the defendant, but from the defendant's initial decision to involve himself in the sale of heroin which was the crime charged in the indictment. Furthermore, the jury was required to evaluate Atilés' state of mind, his knowledge and intent, when he stated to the agents that the heroin was "of excellent quality." The physical evidence was directly probative of that state of mind, which, as the District Judge noted in admitting the evidence, was still at issue despite Atilés' proffered stipulation. (Tr. 64).

In addition, the jury was required to evaluate the continuing nature of the conspiracy charged in the indictment. The remaining two heroin exhibits seized from Perez' apartment on April 12, 1977, while Atilés was present, were similar in size and appearance to those Perez had shown Nieves on April 8, 1977, saying they were what he sold on the street, and were of the same quality as the larger amount he would sell Nieves. For this reason they, too, were admitted in evidence.* (Tr. 240-250).

* The District Judge did not permit the jury to consider the heroin from the three prior sales by Perez to Nieves, which, although they were part of the conspiracy charged in the indictment, did not include Atilés as an active participant.

The District Judge is afforded wide discretion to evaluate all the competing considerations, and to arrive at a ruling based upon his evaluation of the probative value of the offered evidence and its potential prejudice. *United States v. Leonard*, *supra*, at 1092; *United States v. Ravich*, 421 F.2d 1196, 1203-04 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970). On review of his rulings made pursuant to Rule 403, F.R. Ev. the standard in this Court is whether he has abused his discretion, and acted arbitrarily or irrationally. *United States v. Robinson*, *supra*, at 514-15. Since in this case the District Court admitted only the evidence seized on the day Atilas was seen by the agents, and received that evidence only after specific reasons were advanced by the Government, the District Judge cannot be said to have acted arbitrarily.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

THELMA WILKINSON being duly sworn,
deposes and says that She is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
9th day of March, 1978 she served ^{8 COPIES} ~~a copy~~ of the
within Brief

by placing the same in a properly postpaid franked envelope addressed:

Jesse Berman, Esq.
351 Broadway
New York, New York

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

9th day of March, 1978

OLGA C. GRAMPP
Notary Public New York State
No. 43-4620338
Qualified in Richmond Cty.
Comm. Expires March 30, 19

79

